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JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES' LEGAL INTERPRETATIONS AFTER *LECHMERE, INC. v. NLRB*

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Abstract: In *Lechmere, Inc. v. NLRB,* the Supreme Court held that when interpreting administrative statutes, the Court will defer to its own previous interpretations rather than defer to administrative agencies' interpretations of statutes. Thus, the Court determined that stare decisis is dominant over judicial deference to administrative agencies. The Court decided *Lechmere, Inc. v. NLRB* wrongly. The rationales for deference to agencies exist whether or not the courts have addressed the statute in question. Therefore, courts should apply the doctrine of judicial deference even when courts have previously interpreted a statute.

In the twentieth century, courts have shown a growing willingness to defer to administrative agency decisions on policy matters and statutory interpretations.[1] In *Chevron, U.S.A., Inc. v. National Resources Defense Council,*[2] the Supreme Court held that if an administrative statute is ambiguous and an agency gives a "permissible construction"[3] of the statute, a court must defer to the agency decision even if the court disagrees with the agency's interpretation of the statute.[4] The *Chevron* standard applies in all cases involving statutory interpretation by agencies.[5] The Court, however, has recently modified the *Chevron* standard. In *Lechmere, Inc. v. NLRB,*[6] the Supreme Court did not apply the *Chevron* standard because the Court had previously addressed the statute in question.[7] Thus, contrary to *Chevron,* under *Lechmere* the doctrine of stare decisis takes precedence over the doctrine of judicial deference.

The new standard of deference outlined in *Lechmere* may lead to fact-based decisions because it may be applied inconsistently.[8] In addition, the Court's emphasis on stare decisis in *Lechmere* directly conflicts with the Court's past reasons for adopting judicial deference. Those reasons are agency expertise, agency flexibility, and political accountability. First, when a court follows stare decisis rather than agency statutory interpretations, it ignores the importance of defer-

1. *See infra* notes 15–32 and accompanying text.
2. 467 U.S. 837 (1984).
3. *Id.* at 843.
4. *Id.* at 844.
5. *Id.* at 842–43.
6. 112 S. Ct. 841 (1992).
7. *Id.* at 847.
8. *See infra* notes 144–49 and accompanying text.

ence to agency expertise in regulatory decisions.[9] Second, although stare decisis promotes consistency in the law, it is static and prevents flexibility in the administrative process.[10] Third, stare decisis prevents judges from deferring to politically accountable administrative agencies.[11]

The Court should not favor stare decisis over deference to agencies, as in *Lechmere.* Instead, the Court should continue to follow the rules for deference to agencies outlined in *Chevron.* The policy reasons for deferring to agency interpretations of statutes exist even when the courts have previously interpreted the statutes in question. Therefore, *Chevron's* doctrine of judicial deference should apply regardless of whether the statute has been interpreted by courts.

I. JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES IN MODERN LAW

The growth of the bureaucratic state in the twentieth century created new problems for the judiciary.[12] In particular, the courts became concerned about the amount of deference that they should give to administrative agencies' decisions.[13] The following sections describe the historical growth of judicial deference to administrative agencies, the modern standard of deference to agencies outlined in *Chevron,* and the apparent narrowing of the standard under *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*[14] In addition, the new standard of judicial deference articulated in *Lechmere* will be discussed.

A. Prior to Chevron, *Courts Were Less Deferential to Administrative Agencies*

As the modern bureaucratic state evolved during the twentieth century, both the courts and Congress struggled with the issue of judicial deference to administrative agencies. Fifty years ago, attorneys and law professors testified before Congress that the increasing complexity of legislation required expert knowledge and judgment in interpreta-

9. *See infra* notes 41–43 and accompanying text.
10. *See infra* notes 44–47 and accompanying text.
11. *See infra* notes 48–51 and accompanying text.
12. CHRISTOPHER F. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREACRACY 4 (1990).
13. *Id.*
14. 110 S. Ct. 2759 (1990).

tion of administrative statutes.[15] The legal experts concluded, therefore, that judges should give special deference to agency experts who were especially familiar with the burdens and policy issues surrounding the implementation of administrative statutes.[16] Despite these expert opinions, Congress commanded in the Administrative Procedure Act of 1946 that courts reviewing agency decisions must retain jurisdiction over all relevant questions of law.[17] The Administrative Procedure Act, however, did not provide any standards for judicial review of nonlegal issues.[18] As a result, courts developed varying standards of review for administrative agency decisions. These standards depended largely on whether the question was one of fact, law, or a mixed question of fact, law, and policy.[19]

The standard of review for questions of fact is highly deferential.[20] Courts accept agencies' factual determinations as long as they are not "arbitrary or capricious."[21]

Prior to 1944, the standard of review for questions of law was not deferential because courts were, and still are, the final authority on the interpretation of law.[22] Further, the Administrative Procedure Act specifically commanded that "the reviewing court shall decide all relevant questions of law . . . ."[23] The standard for questions of law was qualified in cases in which the statute delegates lawmaking powers to the agency. In these cases, courts must show greater deference to agency decision making.[24]

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15. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 90–91 (1941).

16. *Id.*

17. 5 U.S.C. § 1009(e) (1946).

18. *Id.*

19. Frequently, when agencies apply statutory terms to mixed questions, the elements are so intermingled they are difficult to separate. *See* EDLEY, *supra* note 12, at 104.

20. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Abbott Lab. v. Gardner, 387 U.S. 136 (1967).

21. *Vople*, 401 U.S. at 416.

22. 5 U.S.C. § 1009(e) (1946). *Chevron* also recognizes the supremacy of the courts in statutory interpretation: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837, 843 n.9 (1984). *Chevron* recognizes, however, that ambiguous statutes may have more than one permissible interpretation, and that a "permissible construction" of a statute by an agency must be upheld by the courts. *Id.* at 843 n.11.

23. Administrative Procedure Act of 1946 § 10, 5 U.S.C. § 706 (1988).

24. *See, e.g.*, United States v. Shimer, 367 U.S. 374, 382–83 (1961) (stating that when an agency makes "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned"); Gray v. Powell, 314 U.S. 402, 412 (1941) (stating that in cases where an expert determination

Mixed questions of policy, fact, and law pose special problems because different standards of review exist for questions of policy, of fact, and of law. Policy questions require greatest deference,[25] fact questions require less deference,[26] and law questions require the least deference.[27]

Although the courts traditionally gave agency interpretations of law less deference than questions of policy and fact, the Supreme Court expanded its policy of deferring to agency interpretations of law as the century progressed. In 1944, the Court held in *NLRB v. Hearst*[28] that when an agency interprets a broadly defined statutory term, without the benefit of prior judicial comment on the statute, the courts must accept the agency definition if it has " 'warrant in the record' and a reasonable basis in law."[29]

In the 1970s, the Court showed even greater deference to administrative agencies' legal interpretations. In *Morton v. Ruiz*,[30] the Court deferred to an agency's legal interpretation of a statute even though Congress had not explicitly delegated lawmaking powers to the agency.[31] The *Morton* Court held that administrative agencies may be required to formulate policy and to "fill any gap left, implicitly or explicitly, by Congress."[32] Thus, the *Morton* Court determined that agencies had the authority to fill gaps left in a statute by Congress, and that these agency determinations would have the force of law.

"has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched").

25. *See, e.g.*, SEC v. Chenery, 332 U.S. 194, 207–09 (1947) (stating that policy judgments are "entitled to the greatest amount" of deference by appellate courts because administrative agencies are better equipped to make policy decisions).

26. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (stating that agency factual determinations will be accepted if they are not "arbitrary or capricious," and that courts cannot substitute their own factual determinations for agencies' factual determinations); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 474–76 (D.C. Cir. 1974) (stating that review of facts and review of policy judgments differ conceptually, and courts must be more sensitive when reviewing agency policy judgments than facts).

27. *See, e.g.*, Volkswagenwerk v. Federal Maritime Comm'n, 390 U.S. 261, 272 (1968) (stating that although the agency's interpretation of a statute might be entitled to some deference, the courts are the final authority to determine the construction of the statute); Petrou Fisheries, Inc. v. ICC, 727 F.2d 542, 545 (5th Cir. 1984) (stating that courts should give little deference to agency's legal interpretations because agencies "[possess] no special skill in statutory interpretation").

28. 322 U.S. 111 (1944).

29. *Id.* at 131.

30. 415 U.S. 199 (1974).

31. *Id.* at 230–31.

32. *Id.* at 231.

B. The New Chevron *Standard Mandates Judicial Deference to Permissible Administrative Interpretations of Law*

The Supreme Court articulated the modern test for judicial review of administrative agency interpretations of law in *Chevron, U.S.A., Inc. v. National Resources Defense Council.*[33] The Court held in *Chevron* that courts must accept an administrative agency's reasonable interpretation of any ambiguous terms of a statute when the agency is charged with administering that statute.[34] When reviewing agency decisions, *Chevron* holds that courts must use a two-step process. First, the court must determine whether the statute is ambiguous.[35] If Congress' intent is clear, the statute is not ambiguous and the agency must follow the clear meaning of the statute.[36]

If the statute is ambiguous, however, the court must move to the second step of the analysis. In the second step, the court determines whether the agency interpretation is based on a "permissible construction of the statute."[37] If it is a "permissible construction," the court must defer to the agency.[38] A court may find that the agency used a "permissible construction" of the statute even where the court does not conclude that the agency interpretation is the only permissible interpretation, or that the court would have interpreted the statute in the same way had the question first arisen in a judicial proceeding.[39] A permissible interpretation is merely one that is not "arbitrary, capricious, or manifestly contrary to the statute."[40]

The *Chevron* court gave three primary policy rationales for deferring to administrative agencies' statutory interpretations: agency expertise, agency flexibility, and political accountability. First, the Court stated that the complexity of modern bureaucracy necessitates deference to agencies because judges are not experts in the field but agencies can develop the requisite expertise.[41] Consequently, judicial deference to agencies is particularly appropriate in cases where the

33. 467 U.S. 837 (1984).

34. *Id.* at 843–44.

35. *Id.* at 842–43.

36. *Id.* at 843.

37. *Id.*

38. *Id.* at 844.

39. *Id.*

40. *Id. Chevron's* standard for deference to agency legal interpretations of ambiguous statutes is virtually identical to the standard of deference for agency factual determinations. *See supra* note 26 and accompanying text. *Chevron's* standard of deference to agency legal interpretations contrasts with the lesser standard of deference traditionally given to agency's legal interpretations. *See supra* note 27 and accompanying text.

41. *Chevron,* 467 U.S. at 865.

regulations are "technical and complex."[42] Furthermore, *Chevron* states that the executive branch is more capable than the judicial branch of "resolving the competing interests which Congress itself either inadvertently did not resolve; or intentionally left to be resolved by the agency . . . ."[43] Thus, courts should defer to agencies because agencies have firsthand knowledge of the circumstances surrounding the application of statutes.

Second, agencies' statutory interpretations provide flexibility.[44] Courts are bound by their prior decisions under the doctrine of stare decisis. In contrast, agencies are free to modify their policies on a continuing basis to adapt to changing conditions or new information.[45] For example, the Supreme Court has consistently held that agencies are free to change their interpretations of statutes in response to social and technological changes.[46] The *Chevron* Court stated that to make informed decisions, agencies must continually consider varying interpretations of statutes and the wisdom of the agencies' policies.[47] Stare decisis does not allow courts to be as flexible as agencies.

Third, the Court stressed in *Chevron* that agencies are more politically accountable than the judiciary so it is more appropriate for agencies to make legal decisions involving government policy.[48] Agencies derive their political accountability from the President.[49] Although agencies are not elected by the people, the head of the executive branch is elected. As the head of the executive branch, the President appoints agency heads and oversees agencies' operations.[50] The judiciary, on the other hand, has no political accountability because it has no constituency.[51] The *Chevron* Court held that judges must respect the policy choices made by those who are politically accountable, i.e. agencies.[52] The Court said that it is "entirely appropriate" for the executive branch, under the President's leadership, to balance the pol-

42. *Id.*
43. *Id.*
44. *Id.* at 864.
45. *Id.*
46. *See, e.g.,* NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978), *cert. denied,* 447 U.S. 935 (1980); Hudgens v. NLRB, 424 U.S. 507 (1976); NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).
47. *Chevron,* 467 U.S. at 864.
48. *Id.* at 865.
49. *Id.*
50. U.S. CONST. art. II.
51. *Chevron,* 467 U.S. at 865.
52. *Id.*

icy interests involved in administrative statutory interpretation.[53] Thus, for the combined reasons of agency expertise, agency flexibility, and political accountability, the Supreme Court in *Chevron* stated that courts must defer to administrative agencies' legal interpretations that are reasonable and consistent with statutes.[54]

C. Chevron *is Modified:* Maislin Industries, U.S., Inc. v. Primary Steel, Inc.

Chevron is the last in a long line of cases that give significant deference to administrative agencies. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,*[55] however, began a countervailing trend that limits the circumstances in which courts use the *Chevron* analysis. In *Maislin,* the United States Supreme Court refused to apply the *Chevron* analysis in a case where the court had a long history of insisting on a literal interpretation of a statute.[56]

The *Maislin* Court overturned an Interstate Commerce Commission (ICC) interpretation of the Interstate Commerce Act.[57] Under the Interstate Commerce Act,[58] common motor carriers must file freight transport rates with the ICC.[59] Both carriers and shippers must adhere to these transport rates[60] unless the carrier's rates or practices are unreasonable.[61] The ICC has the authority to determine whether a rate or practice is unreasonable.[62] If the ICC finds a practice or rate is unreasonable, the ICC may substitute a different rate or practice.[63] Under the "reasonableness" exception in the Interstate Commerce Act, the ICC allowed carriers and shippers to charge rates lower than those filed with the ICC.[64] In 1986, the ICC changed the strict rule of adhering to tariff rates because changes in the motor carrier industry made adherence to rates unreasonable.[65]

The Supreme Court reversed the ICC interpretation of the Interstate Commerce Act, and held that the Act prohibited any deviation

53. *Id.*
54. *Id.* at 864–65.
55. 110 S. Ct. 2759 (1990).
56. *Id.* at 2768.
57. *Id.*
58. 49 U.S.C. § 10101 (1988).
59. *Id.* § 10762(a)(1).
60. *Id.* § 10761(a).
61. *Id.* §§ 10701(a), 10704(a)(1).
62. *Id.* § 10704(a)(1).
63. *Id.*
64. National Indus. Transp. League, 3 I.C.C.2d 99 (1986).
65. *Id.* at 106.

from the rate filed with the ICC.[66] The Court did not apply the *Chevron* test in *Maislin.* The Court held that the ICC decision was inconsistent with the "reasonableness" exception in the Interstate Commerce Act.[67] Although the Court primarily relied on the text of the statute,[68] the Court also relied on its own eighty-year history of strict interpretation of the Interstate Commerce Act.[69]

The two dissenters in *Maislin,* Justice Stevens and Chief Justice Rehnquist, argued that a strict adherence to the majority opinion would produce "absurd results" and serve no social purpose.[70] Moreover, the dissenters argued, the majority did not use the *Chevron* doctrine when the majority determined the ICC statutory interpretation was invalid.[71] The majority concluded the agency's interpretation was inconsistent with "the statutory scheme as a whole,"[72] but the dissenters claimed that the Court mistakenly reached this conclusion by relying on previous court cases.[73] Given the reasonableness of the ICC interpretation, the dissenters concluded that the Court should have deferred to the ICC decision.[74]

One commentator argues that because the Court refused to consider recent changes in the motor carrier industry, as well as recent statutes affecting motor carriers, the majority used an overly rigid interpretation of the Interstate Commerce Act.[75] Furthermore, this interpreta-

66. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2768 (1990). The Interstate Commerce Act states: "[The] carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." 49 U.S.C. § 10761(a) (1988).

67. *Maislin,* 110 S. Ct. at 2768.

68. Reliance on statutory language is particularly emphasized in Justice Scalia's concurring opinion. Although Justice Scalia acknowledges that the majority in *Maislin* relied for authority on past Supreme Court decisions, this reliance was proper as these decisions were not based on "the regulatory climate within which the statute then operated" but rather on the "text of the statute." *Id.* at 2771.

69. *Id.* at 2768. As the majority explained: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis,* and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Id.*

70. *Id.* at 2779. Under *Maislin,* if a carrier filed for bankruptcy, the bankruptcy trustee could bill the shipper for the filed rate rather than the negotiated rate. *Id.* at 2768. This result, Justice Stevens argued, would produce a "bonanza" for the bankruptcy bar because it would produce a windfall for unsecured creditors. *Id.* at 2780.

71. *Id.* at 2779.

72. *Id.* at 2768.

73. *Id.* at 2779.

74. *Id.*

75. Dennis L. Murphy, Maislin Industries, U.S. Inc. v. Primary Steel, Inc.: *What Happened to Deference?,* 41 CASE W. RES. L. REV. 627, 638 (1991).

tion produced a harsh result for the interested parties.[76] Such a result would not have occurred, the commentator argues, if the Court had deferred to the ICC's greater expertise.[77] Further, the commentator hypothesized that the Court in *Maislin* was less concerned with deference to administrative agencies and more concerned with sending a message to Congress to prevent shoddy legislation.[78] In so doing, however, the Court created a precedent that prohibits the application of *Chevron* in cases where courts have a long history of strictly interpreting a statute.

In *Maislin,* the Court placed greater emphasis on the doctrine of stare decisis than it did in *Chevron*. Consequently, the *Lechmere* decision, which followed soon after *Maislin,* must be examined in the new judicial context where the Court is reluctant to defer to agencies' statutory interpretations when the Court has already interpreted the statute.

D. Lechmere, Inc. v. NLRB

1. The Facts

The dispute in *Lechmere* centered on the rights of nonemployee union organizers to distribute literature on the private property of a nonunion company.[79] Lechmere, Inc. owned a retail store in a shopping plaza.[80] Union organizers had planned to distribute brochures on Lechmere employees' car windshields.[81] The company prevented them from gaining access to the employee parking lot.[82] The organizers filed a grievance with the NLRB, charging that Lechmere's acts violated sections 7 and 8 of the National Labor Relations Act (NLRA).[83] Section 7 of the NLRA guarantees employees the right to

76. *Id.* at 628. This "harsh result" is a product of recent changes in the motor carrier industry. Before the passage of the Motor Carrier Act, carriers were more widely regulated and uniformly charged the same rate for all freight shipped similar distances. As a result, it was not difficult for shippers to discover the filed rate. *See* Negotiated Rates I, 2 I.C.C.2d 99, 104 (1986). The Motor Carrier Act gave carriers broad authority to set prices. Carriers today must offer competitive prices on short notice. Because hundreds of motor carrier rates may be negotiated daily, shippers have a difficult time determining whether a negotiated rate is actually on file.

77. Murphy, *supra* note 75, at 638.

78. *Id.*

79. Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 844 (1992).

80. *Id.* at 843.

81. *Id.* at 844.

82. *Id.*

83. *Id.*

organize themselves.[84] Section 8 prohibits employers from interfering with employee self-organization.[85]

An administrative law judge found for the union organizers, and ordered Lechmere to "cease and desist" from barring organizers access to the parking lot.[86] The NLRB affirmed this decision, relying in part on its decision in *Jean Country v. Retail & Wholesale Employees Union.*[87] The First Circuit Court of Appeals also approved the administrative judge's order.[88] The First Circuit held that the NLRB's balancing test for resolving conflicts was entitled to deference because it was consistent with the National Labor Relations Act.[89] Furthermore, the First Circuit determined that the NLRB's decision was entitled to deference even if it departed from the prior policy of the NLRB.[90]

2. *The* Lechmere *Holding*

The Supreme Court in *Lechmere, Inc. v. NLRB*[91] reversed the Court of Appeals. In reaching its decision, the Court rejected *Jean Country*, stating that *Jean Country* rested on "erroneous legal foundations."[92] The Court stated that *Jean Country* conflicted with previous Supreme Court decisions[93] and relied on a mistaken interpretation of *Hudgens v. NLRB.*[94] The NLRB in *Jean Country* interpreted *Hudgens* to mandate a balancing test between the rights of the employ-

84. National Labor Relations Act § 7, 29 U.S.C. § 157 (1988). 29 U.S.C. § 157 states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

85. National Labor Relations Act § 8, 29 U.S.C. § 158 (1988) states: "It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . ."

86. Lechmere, Inc., 295 N.L.R.B. 92 (1988)

87. 291 N.L.R.B. 11 (1988). In *Jean Country,* the NLRB implemented § 7 of the NLRA using a balancing test: the employee's rights must be balanced against the employer's property rights and the availability of alternative ways to communicate with employees. *Id.* at 14.

88. Lechmere, Inc. v. NLRB, 914 F.2d 313, 324–25 (1st Cir. 1990).

89. *Id.*

90. *Id.* at 318. The NLRB was free to depart from its prior policy because agencies are allowed to change their statutory interpretations in response to new information or changing social conditions. *See supra* note 46 and accompanying text.

91. 112 S. Ct. 841, 850 (1992).

92. *Id.* at 849.

93. *Id.* at 848.

94. *Id.; see also* Hudgens v. NLRB, 424 U.S. 507 (1976).

ees and the property rights of the employer.[95] The *Lechmere* majority claimed that this was an inappropriate interpretation of *Hudgens.*[96]

After rejecting *Jean Country,* the Court said the appropriate test was found in *NLRB v. Babcock & Wilcox Co.,*[97] not *Hudgens.*[98] The *Babcock* Court had held that employers need not accommodate non-employee organizers unless the employees are otherwise inaccessible.[99] The *Lechmere* majority then defined "inaccessibility" narrowly. The Court held that employees are "inaccessible" only where the plant location or the employees' living quarters are beyond the reach of reasonable efforts of communication.[100] The majority reasoned the *Lechmere* employees were not "inaccessible" because the union could have contacted the employees through phone calls, mail, or signs off of the employer's property.[101] The Court concluded based on these findings that the organizers were not entitled to access to Lechmere's private property.

3. *The* Lechmere *Dissents*

The dissenters, Justices Stevens, White, and Blackmun, disagreed with the majority's interpretation of *Babcock.* They argued that the majority had interpreted the *Babcock* exception far more broadly than it had ever been interpreted in the past.[102] The dissenters cited two cases supporting their position. First, in *Central Hardware Co. v. NLRB,*[103] the Court had held that the guiding principle for resolving conflicts between section 7 rights and the property rights of employers was "accommodation."[104] The *Lechmere* dissenters argued that the word "accommodation" indicates flexibility in balancing the employer's property rights and the employees' rights to self-organize.[105] Second, in *Hudgens v. NLRB,*[106] the Court again chose "accommodation" as the principle to be used when balancing the interests of employers and employees. The *Hudgens* Court held that the appropriate "accommodation" between the interests of employees

95. *Lechmere,* 112 S. Ct. at 848.
96. *Id.*
97. 351 U.S. 105 (1956).
98. *Lechmere,* 112 S. Ct. at 848.
99. *Babcock,* 351 U.S. at 112.
100. *Lechmere,* 112 S. Ct. at 849.
101. *Id.* at 849–50.
102. *Id.* at 850 (White, J., dissenting); *id.* at 854 (Stevens, J., dissenting).
103. 407 U.S. 539 (1972).
104. *Id.* at 544.
105. *Lechmere,* 112 S. Ct. at 851.
106. 424 U.S. 507 (1976).

and employers depended primarily on context, and that the responsibility for finding the appropriate accommodation between interests rested with the NLRB.[107]

Although *Central Hardware* and *Hudgens* did not purport to modify *Babcock,* the dissenters argued that these cases supported a more flexible rule than the one used in *Lechmere.*[108] The dissenters argued that the cases indicated that the appropriate test should balance the interests of both employers and employees.[109] The majority test did not attempt to balance the interests of the parties. Instead, the majority focused on the accessibility of employees.[110] Because previous Supreme Court cases indicated a more flexible standard focusing on interests of employees and not simply on their accessibility, the dissenters argued the facts in *Lechmere* supported the organizers' right of access to the employee parking lot.[111] Therefore, the Court should not have reversed the NLRB decision in *Lechmere* because the NLRB found an appropriate accommodation between the interests of the employees and the employer.[112]

Two of the dissenters, Justices White and Blackmun, gave an even more fundamental reason for disagreeing with the majority. They argued that *Babcock* should not control because *Babcock* was decided over thirty years before *Chevron.* They reasoned that if *Babcock* had been decided under the *Chevron* rule, *Babcock* would have been decided differently.[113] Justices White and Blackmun argued that under the *Chevron* rule, the *Babcock* Court would have deferred to the NLRB's construction of the statute.[114] According to this dissent, the majority did not use the appropriate standard of judicial review.[115] The dissenters argued the Court only had to determine whether the NLRB ruling is rational and consistent with the statute, as outlined in *Chevron.*[116] The agency's position did not have to match the Supreme Court's interpretation of the statute.[117] Rather, the interpretation must be "reasonable."[118]

107. *Id.* at 522.
108. *Lechmere,* 112 S. Ct. at 851.
109. *Id.* at 852.
110. *Id.*
111. *Id.* (White, J., dissenting); *id.* at 854 (Stevens, J., dissenting).
112. *Id.* at 852.
113. *Id.*
114. *Id.*
115. *Id.* at 853.
116. *See id.* at 852–53.
117. *See id.*
118. *Id.* at 852.

Because the *Lechmere* Court substituted its own statutory construction for a permissible construction given by the NLRB, the dissenters argued that *Lechmere* conflicts with *Chevron.*[119] In fact, by failing to apply *Chevron* analysis, the dissenters stated that the Court caused the doctrine of judicial deference to administrative agencies to revert to a pre-*Chevron* standard.[120] They said that the pre-*Chevron* standard gave less deference to administrative agencies, and resulted in the adoption of "static judicial construction[s]."[121] Furthermore, the dissenters felt a pre-*Chevron* standard could not adequately defer to agencies because courts could take over the agency's job of making policy decisions.[122]

II. THE NEW *LECHMERE* STANDARD DOES NOT GIVE ADEQUATE DEFERENCE TO ADMINISTRATIVE AGENCIES

As stated earlier, *Chevron* analysis requires courts to use a two-part test.[123] First, the court must determine whether a statute is ambiguous. Under *Chevron,* the Court can strike down agency interpretations of statutes that are not ambiguous.[124] If the statute is ambiguous, however, the court must then determine whether an agency gave a permissible interpretation of the statute.[125] If the agency interpretation is permissible, the Court must defer to the agency interpretation.[126]

In *Lechmere,* the Court did not analyze the NLRA to determine whether it was ambiguous, or whether the NLRB interpreted any statutory ambiguity in a permissible way. Instead, the Court concluded that it did not have to use the *Chevron* analysis because it had previously interpreted the NLRA.[127] Because the Court did not use the *Chevron* standard to analyze the NLRA, *Lechmere* modifies *Chevron* by limiting the cases when *Chevron* analysis is used. The Court's analysis in *Lechmere* is flawed. The Court undervalues the importance of agency expertise, agency flexibility, and political accountability when it favors stare decisis over deference to agency interpretations. Courts

119. *See id.*
120. *See id.* at 853.
121. *Id.*
122. *See id.* at 852.
123. *See supra* notes 33–40 and accompanying text.
124. Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837, 843 (1984).
125. *Id.*
126. *Id.* at 844.
127. Lechmere, Inc. v. NLRB, 112 S.Ct. 841, 847–48 (1992).

should defer to permissible statutory interpretations of agencies rather than follow stare decisis.

A. *The* Lechmere *Holding Limits the Application of the* Chevron *Standard of Deference to Agency Legal Interpretations*

Chevron directs courts to first look to the wording of statutes to determine whether agency interpretations are "permissible."[128] If the court determines an agency interpretation is "permissible," the court must defer to the agency interpretation.[129] The *Lechmere* case hinges on the interpretation of section 7 and section 8(a)(1) of the National Labor Relations Act.[130] Neither section of the NLRA directly addresses the issue of the rights of nonemployee union organizers.[131] Because the statute does not mention nonemployee union rights, the Court could have determined that the statute gives nonemployee union organizers no rights.[132] If the Court had found that nonemployee union organizers had no rights under sections 7 or 8(a)(1) of the NLRA, then the Court could find the NLRB's interpretation of the statute impermissible.

The Court determined, however, that nonemployee union organizers had rights under the statute, as defined by *Babcock*.[133] The Court recognized employees' rights to learn from nonemployees about union organization. The Court also recognized an employer's obligation, in limited circumstances, to grant the nonemployee union organizers access to its property.[134] Thus, the Court held that the union had rights that were not explicitly granted by statute.[135] Because nonemployee rights were not explicitly granted in the statute, by definition these rights must be ambiguous.

If nonemployee rights to organize unions are part of the statute and they are ambiguous by definition, *Chevron* and its line of authorities permit the NLRB to fill the gap left by Congress to determine the

128. *See supra* notes 33–40 and accompanying text.

129. *See supra* notes 33–40 and accompanying text.

130. *See supra* notes 84–85 and accompanying text.

131. *See supra* notes 84–85 and accompanying text.

132. The *Lechmere* majority explained that "by its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 845 (1992). Thus, one possible interpretation of the statute is that it confers no rights on nonemployees. The dissenters in *Lechmere* also acknowledged the possibility of this interpretation: "[T]he language of § 7, . . . speaks only of the rights of employees; i.e. the Court might have found that § 7 extends no access rights at all to union representatives." *Id.* at 852.

133. *Id.* at 848.

134. *Id.*

135. *See id.*

scope of those rights.[136] The agency's definition should be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute."[137] The Court concluded, however, that the NLRB's balancing test for measuring those rights was an "impermissible" construction of the statute.[138]

1. Lechmere's *Standard Is Inconsistent with* Chevron's *Standard*

In determining that the NLRB's statutory construction was impermissible, the Court did not use the *Chevron* standard of classifying the interpretation as "arbitrary, capricious, or manifestly contrary to the statute." Instead, the Court said that the NLRB's interpretation rested on "erroneous legal foundations."[139] Apparently, *Lechmere's* "erroneous legal foundations" standard replaces *Chevron's* "arbitrary, capricious, or manifestly contrary to the statute" standard.[140] Therefore, *Lechmere* uses a different standard than *Chevron* when determining the deference the Court should give to agency determinations.

The *Lechmere* majority attempts, however, to reconcile its new standard with *Chevron.* The majority claims that *Babcock* "[was] saying, in Chevron terms, that § 7 speaks to the issue of nonemployee access to an employer's property."[141] This statement is flawed. *Babcock* was decided thirty years before *Chevron.* Therefore, it could not speak in "*Chevron* terms." *Babcock* was decided under a pre-*Chevron* analysis that gave little deference to agency interpretations of law or "mixed questions" of law, fact, and policy.[142] There is no indication in *Babcock* that the Court made any attempt to use *Chevron*-type analysis. Thus, the Court cannot reconcile *Lechmere* with *Chevron* using its *Babcock* rationale. *Babcock* preceded *Chevron* and did not utilize *Chevron's* standard.

The Court cannot reconcile *Lechmere* with *Chevron* because *Lechmere* is a modification of *Chevron.* The *Chevron* Court implicitly delegated to agencies the authority to interpret statutes.[143] Thus, courts should apply the *Chevron* standard in all cases regarding deference to administrative agencies, even if the court had previously addressed the statute in question. The Supreme Court refused to use *Chevron* analy-

136. *See supra* notes 30–40 and accompanying text.
137. Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837, 844 (1984).
138. *Lechmere,* 112 S. Ct. at 848.
139. *Id.* at 849.
140. *Chevron,* 467 U.S. at 844.
141. *Id.* at 848.
142. *See supra* notes 22–27 and accompanying text.
143. *Chevron,* 467 U.S. at 843–44, 865–66.

sis in *Lechmere,* however, because the Court had previously interpreted the statute in question. Thus, *Lechmere* has modified *Chevron* so that the *Chevron* standard only applies to cases where the Court has not previously addressed the statute in question.

2. *Inconsistency in the Application of the Standard of Judicial Deference May Lead to Fact-based Decisions*

Although *Lechmere* modifies *Chevron* by limiting its application and placing increased importance on stare decisis, four of the justices have not consistently applied the modification of the doctrine. Both Justice White and Justice Blackmun, the standard bearers for judicial deference in *Lechmere,* signed the majority opinion in *Maislin.*[144] Justice Stevens and Chief Justice Rehnquist, on the other hand, argued at length about the importance of *Chevron* in their dissent in *Maislin,*[145] yet they did not invoke *Chevron* analysis in *Lechmere.*[146] The inconsistency with which these justices apply stare decisis analysis and *Chevron* analysis indicates that these analyses may be invoked by some justices solely on a fact-specific basis.[147]

If the Court does not apply *Chevron* consistently, it reverts to a pre-*Chevron* standard. Prior to *Chevron,* the Court used a lower standard of deference.[148] If the Court uses a lower standard of deference, the Court will "defer" to the agency decisions with which the Court agrees. This is not deference at all, but a "rubber stamping" of the agency decision. The Court's refusal to apply *Chevron* in all administrative law cases suggests a return to a lower standard of deference. Such an ad hoc application of *Chevron* makes it a functionally useless doctrine, because one of *Chevron's* primary purposes was to prevent result-oriented judicial decisions.[149]

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144. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990).

145. *Id.* at 2779.

146. Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 844 (1992).

147. Nor is the inconsistency in the application of *Chevron* confined to *Maislin* and *Lechmere.* Professor Douglas Leslie has commented on the Supreme Court's failure to defer to an agency interpretation in another labor law case:

> Had the members of the Supreme Court liked the Board's result in this case, we probably would have found in the Court's opinion references to the Board's expertise and comments about the Board's role as the primary interpreter of the statute. Not liking the result in this case, the Court doesn't include such language.

DOUGLAS LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 448 (2d ed. 1985).

148. *See supra* notes 22–23 and accompanying text.

149. The importance of consistent application of the standard of deference is implied in *Chevron. See* Chevron, U.S.A., Inc., v. National Resources Defense Council, 467 U.S. 837, 843–44, 865–66 (1984).

At least one commentator has argued that judicial objectivity is impossible, and that courts should simply give up on notions of judicial deference and concentrate solely on sound governance.[150] This commentator's critiques are valid. It is not clear, however, that a consistent application of the standard enunciated in *Chevron* would necessarily lead to fact-specific holdings. Under *Chevron,* courts are still able to overturn agency decisions that directly conflict with statutes. Courts are only required to defer to agencies when the agency makes reasonable interpretations of ambiguous statutes. Under a pre-*Chevron* standard, however, courts need not consistently defer to an agency when the agency reasonably interprets an ambiguous statute. Therefore, the pre-*Chevron* standard of deference necessarily leads to result-oriented decisions because the Court need not defer to any agency statutory interpretation with which it does not agree.

The change of four justices' positions between *Lechmere* and *Maislin* indicates that judges may inconsistently apply the new standard of giving more weight to stare decisis than to deference to administrative agencies. Lack of consistency in application of a standard of deference leads to result-oriented decisions. One of the central purposes of *Chevron* was to eliminate fact-determined results when determining the degree of deference to agencies' statutory interpretations. This purpose of *Chevron* may be invalidated by *Lechmere.*

B. The Lechmere *Holding Is at Odds with the Policy Rationales for Deference to Administrative Agencies*

Allowing stare decisis to take precedence over deference to administrative agencies creates a harmful judicial standard. Not only may judges apply stare decisis inconsistently, but the new standard also thwarts the policy rationales for *Chevron:* agency expertise, the

150. This is the thesis of Christopher Edley's book. *See* EDLEY, *supra* note 12. Professor Edley argues that attempting to find standards for deferring to agency decisions is not simply futile, but may be harmful as well:

> [Fact-specific decision making] is inevitable for all but the most self-denying jurists, notwithstanding the volumes of judicial rhetoric stating that the court must uphold 'reasonable' agency action even if the choice is not what the judge would have made had the responsibility been his or hers. The price of indirectness, therefore, is that this inevitable judicial discretion and subjectivity is obscured by doctrinal exegesis . . . . But the doctrine should frame and illuminate choices, not make them obscure. It would be far preferable were judicial attention to soundness more direct and more explicit . . . . Accountibility would be enhanced.

See id. at 220.

importance of flexibility in administrative decision-making, and the political accountability of the executive branch.[151]

1. Agency Expertise

When a court follows stare decisis rather than reasonable agency statutory interpretations, it ignores the importance of deference to agency expertise in regulatory decisions. The Court in *Chevron* argues that the complexity of modern bureaucracy necessitates giving deference to agency decisions because agencies have greater expertise, particularly in highly technical areas.[152] Courts can never have the "hands-on" experience of administering statutes that agencies have. Judges cannot have the experience agencies have in dealing with the complex range of conditions that impact the administering of a statute. The *Lechmere* standard ignores the importance of giving credence to the expertise of professionals who have experience in administering statutes.

Failing to defer to agency expertise may lead to poor court decisions. In *Maislin,* the Court overturned an Interstate Commerce Commission (ICC) determination of common carrier rates partially because the ICC's interpretation was inconsistent with an eighty-year-old interpretation of rates issued by the Court.[153] This led, however, to unusually harsh results for the parties involved. In fact, the Court probably inadvertently promoted the bankruptcy of freight carriers because the *Maislin* decision enabled bankruptcy trustees to bill customers for higher rates than customers agreed to pay.[154] By refusing to allow the agency to change the Court's interpretation of an eighty-year-old statute, the Court helped to create fiscal irresponsibility in the freight carrier industry. If the Court had deferred to agency expertise in *Maislin,* this unfortunate result would not have occurred.

2. Flexibility

The *Lechmere* standard also undermines administrative agencies' flexibility in interpreting statutes. *Chevron* explicitly discusses the importance of giving agencies the freedom to modify their policies to adapt to changing conditions or new information.[155] Even before

151. *See supra* notes 41–54 and accompanying text.

152. *See supra* notes 41–42 and accompanying text.

153. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759, 2768 (1990).

154. *See supra* notes 75–77 and accompanying text.

155. *See supra* notes 44–46 and accompanying text.

Chevron was decided, the Court consistently held that agencies were not bound by their own past statutory interpretations.[156]

Although Justice Scalia does not agree with the dissenters in *Lechmere,* he argues that permitting flexibility, and preventing the rigidity of stare decisis, is one of the major advantages of *Chevron.*[157] In fact, he argues, stare decisis itself may hamper the administrative process. Once the courts resolve ambiguities in statutes they "resolve them for ever and ever," and the only way to produce change is to amend the statute.[158] Consequently, stare decisis may force Congress to act to overturn outdated court interpretations of statutes. This is inefficient for Congress, the agencies, and everyone impacted by the statutory regulation.

Furthermore, stare decisis applies with equal force regardless of the amount of time that has passed since the court interpreted the statute. *Lechmere* was decided on the basis of a thirty-year-old statutory interpretation. *Lechmere* refused to recognize the logistical difficulties that nonemployee union organizers have in contacting employees.[159] This is partially a result of the growing numbers of workers who commute long distances, a social phenomenon that basically did not exist thirty years ago. *Maislin* was decided on the basis of an eighty-year-old statutory interpretation. *Maislin* did not recognize the changes that occurred in the motor carrier industry as a result of deregulation.[160] The Courts failure to recognize these changes ultimately created a situation where some motor carriers gain financially by declaring bankruptcy rather than staying in business.[161] Consequently, as *Lechmere* and *Maislin* demonstrate, stare decisis cannot meet those changing social conditions that could have or should have impacted statutory implementation.

3. *Political Accountability*

Finally, the new *Lechmere* standard does not acknowledge the importance of deferring to the more politically accountable branch of government. Administrative law by its nature is directed by constantly changing policy decisions, and therefore should be directly impacted by "politics" and administered by a politically accountable

156. *See supra* note 46 and accompanying text.

157. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L.J. 511, 517.

158. *Id.*

159. *See supra* notes 99–101 and accompanying text.

160. *See supra* note 76.

161. *See supra* note 70 and accompanying text.

branch of government. Although bureaucrats are unelected, they are a part of the executive branch whose leader, the President, is elected. Therefore, agencies have some measure of political accountability, unlike the judiciary.[162] Therefore, judges should not change policy decisions made by the executive branch that further government policies and do not conflict with statutes.

The *Chevron* rationales of administrative expertise, agency flexibility, and political accountability exist whether or not a court has previously interpreted the statute in question. A court should therefore defer to permissible agency statutory interpretations regardless of whether the court has previously interpreted the statute.

III. CONCLUSION

The *Lechmere* decision held that a court should not defer to administrative agency interpretations of law when the court has previously interpreted the statute in question. The Court's emphasis on stare decisis may appear to promote consistency in these cases. In fact, however, stare decisis as applied in the *Lechmere* and *Maislin* cases may only produce more inconsistency because various justices changed their positions on when it was necessary to defer to administrative agencies. More importantly, the policy rationales for judicial deference, political accountability, agency expertise, and flexibility exist regardless of whether a court has addressed the statute in question. Therefore, a court should defer to permissible statutory interpretations by agencies even if the court has addressed the statute previously.

162. *See supra* notes 48–51 and accompanying text.